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Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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Respondents' brief in opposition puts the question presented in stark relief. Respondents recognize that the Second Circuit expressly adopted a standard requiring a district court to deny a motion to dismiss even where the complaint fails to plead facts that, if proved, would permit the plaintiff to obtain relief under the governing substantive legal standards applicable to the claim. Respondents consider that a virtue of the decision below; petitioners do not.

The Second Circuit, misreading *Swierkiewicz*, held that allegations of parallel conduct *always* survive a motion to dismiss, as long as the plaintiff alleges that the parallel conduct is the product of a conspiracy, unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). At most, the Second Circuit said, conspiracy must be one "plausible" possibility among others equally or even more likely. *Id.*

Respondents do not dispute that such allegations would not support relief or even permit a trial under the governing substantive law of *Matsushita* and *Monsanto*, which requires facts that tend to exclude the possibility of independent, non-collusive action. Nor do respondents make any attempt to grapple with this Court's recent, post-*Swierkiewicz* affirmation in *Dura Pharmaceuticals* that underlying liability rules dictate the allegations required to survive a motion to dismiss. Nor do respondents even mention this Court's admonition in *Associated General Contractors* that a court, in ruling on a motion to dismiss, may not assume a plaintiff may be able to prove facts not alleged in the complaint.

Respondents do not gainsay the importance of the question presented. To the contrary, they insist that the Second Circuit's open invitation to meritless suits – and massive discovery – somehow promotes effective enforcement of the antitrust laws. But, far from defending its ruling on any such policy ground, the Second Circuit invited this Court to review its decision to alleviate the "deleterious effect" of its rule on law-abiding businesses. Pet. App. 30a. The last time a court

of appeals invited this Court's review in an antitrust case, the Court accepted the invitation and reversed unanimously. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). The Court should accept the invitation here as well.

ARGUMENT

A. The Petition Cleanly Presents an Important Question Concerning Proper Pleading Standards and Their Application to Claims of Conspiracy Under Section 1 of the Sherman Act

1. Respondents accuse petitioners of "mischaracteriz[ing]" the Second Circuit's decision and setting up a "straw man." Opp. at 1. They claim that the court below did not hold that allegations of parallel conduct will always survive a motion to dismiss; rather, the complaint must allege "*facts* . . . which make an inference of conspiracy . . . a 'plausible' one." *Id.* But the Second Circuit held – though respondents do not acknowledge, much less defend, the holding – that any claim based on parallel conduct *is* "plausible" unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). It is nearly always *possible* that parties agreed – even when it is more likely that the parallel conduct reflects independent responses to comparable circumstances. *See* Pet. 14 & n.3. The Second Circuit's standard thus permits a plaintiff to plead a claim under Section 1 by alleging otherwise lawful parallel conduct and affixing a "conspiracy" label. This is no "straw man"; it is a holding of tremendous practical importance – as the eight amicus briefs filed in support of the petition attest.[1]

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[1] Respondents point to *In re Tamoxifen Citrate Antitrust Litigation*, 429 F.3d 370, 402 (2d Cir. 2005), as evidence that the Second Circuit's standard is "significantly more demanding" (Opp. at 1-2) than petitioners have suggested. *Tamoxifen* provides no comfort. In that case, the Court held that a settlement agreement between two drug manufacturers – the

Moreover, even if respondents were correct that the Second Circuit's "plausibility" standard requires more than allegations of innocuous parallel conduct coupled with a "conspiracy" label – and respondents identify no parallel conduct allegation that could not support a plausible claim of conspiracy – the Second Circuit's decision still merits review, because the court refused to apply the substantive rules that govern conspiracy claims on a motion to dismiss. Under *Matsushita* and *Monsanto*, where the existence of an agreement is at issue, plaintiffs must point to facts that "tend[] to exclude" the possibility of *independent* action. *See Matsushita*, 475 U.S. at 588. As respondents' opposition makes clear, the question whether the Second Circuit was right to reject that standard in evaluating the legal sufficiency of the complaint is squarely presented. *See* Opp. at 13-18.

2. Any suggestion that the Second Circuit's decision turned, not on the legal question presented, but on an "evaluation of detailed facts alleged," Opp. at 29, cannot be squared with the opinion below. The Second Circuit reversed the district court because it "disagree[d] with the *standard*" that the lower court had applied. Pet. App. 3a (emphasis added). Accordingly, the Second Circuit never took issue with the district court's carefully explained conclusion that the complaint's allegations were insufficient to support a claim of conspiracy in violation of Section 1. Instead, the Second Circuit dismissed such an analysis as legally inappropriate on a motion to dismiss. *See id.* at 10a-11a.

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existence of which was not at issue – was not an unlawful restraint of trade under Section 1. In the passage respondents cite, the court merely noted that one provision of that agreement could not be plausibly construed as reflecting "a separate agreement . . . to protect the defendants from competition," in light of the fact that the provision at issue would not have had the supposed exclusionary effect "in light of the law at the time." 429 F.3d at 402. This passage has nothing to do with what facts must be pleaded to establish the existence of a conspiracy, let alone a conspiracy based on allegations of parallel conduct.

B. The Second Circuit's Decision Conflicts with Rule 8(a), This Court's Precedents, and Decisions of Other Courts of Appeals

1. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). That "showing" depends on allegations of fact – not legal conclusions. And the *legal sufficiency* of the facts alleged must be evaluated in light of the substantive standards that govern the claim. To require a plaintiff to plead facts that, if true, would support a finding of liability is not to require "heightened pleading," Opp. at 7, but to apply Rule 8 as it is written.

Here, the only facts alleged to support plaintiffs' claim of conspiracy under Section 1 are that defendants failed to comply with regulatory obligations benefiting competitors and did not meaningfully compete with one another. Whether defendants *did*, in fact, fail to comply with regulatory obligations (or whether they invested billions in regulatory compliance efforts) and whether defendants *did*, in fact, refrain from competition (or whether they compete vigorously in wireless, enterprise, and other markets where competition is economic) are factual matters outside the scope of inquiry on a motion to dismiss. But, whether plaintiffs' allegations, taken as true, establish Section 1 liability depends on the legal standards of Section 1. That determination must be made, and was properly made by the district court, at the motion to dismiss stage.

Under this Court's precedents, allegations of parallel conduct do not support a claim of conspiracy unless they "'tend[] to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).[2] The district court

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[2] FTC Commissioner Rosch has sharply criticized the decision below, noting that "[t]he core conduct in *Twombly* is parallel conduct by competitors . . . that cannot be treated as conspiratorial." Cecile Kohrs Lindell, TechConfidential (title pending; to be published June 26, 2006). Indeed, as amici economists make clear, parallel conduct is not just

properly evaluated the complaint's allegations against this legal standard; the Second Circuit refused to do so.

2. Respondents offer three justifications for the Second Circuit's refusal to honor *Matsushita*. *First*, they contend that the case applies only on summary judgment. But the Court in *Matsushita* "was basing its decision on *underlying substantive antitrust law* rather than employing a new summary judgment standard." Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1030 (2003) (emphasis added). This Court's holding that parallel conduct, even if proven, will not support liability for conspiracy (absent facts that tend to rule out independent action) likewise applies in evaluating the factual allegations of a complaint that, like this one, bases its conclusion of "conspiracy" on alleged parallel conduct.

Second, respondents argue that judges cannot intelligently evaluate the factual allegations of a complaint without "expert testimony" and "a defendant's own internal business analyses." Opp. at 16.[3] That may be true in some cases, and a district judge may err on the side of allowing those cases to proceed, pending development of an evidentiary record. But, as explained below and in the petition (at 21-26), this case was not even close – the complaint's allegations not only are entirely consistent with wholly *independent* business conduct, but also affirmatively indicate that the conduct was in defendants' individual self-interest absent conspiracy.

Third, respondents argue that petitioners undervalue the importance of antitrust enforcement and overvalue the costs

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innocent, it is generally efficient and pro-competitive. *See* Brief of Economists at 7-9.

[3] Ironically, respondents quote extensively from Judge Lynch's questions to petitioners' counsel probing whether the court had enough information to determine that the complaint failed to satisfy the *Matsushita* standard. Respondents ignore the court's affirmative answer and accompanying explanation, which appear in the appendix to the petition at 45a-58a.

of unmeritorious litigation.[4] The short answer is that this Court struck a balance in *Matsushita*, and respondents' disparagement of that case (*see* Opp. at 14) does not justify the Second Circuit's refusal to apply it. Furthermore, there is no empirical basis for the claim that private suits and discovery fishing expeditions lead to detection of secret conspiracies – to the contrary, according to the Department of Justice, "the vast majority of private suits against cartels[] are follow-on actions triggered by the government's exposure of a cartel." Brief for the United States and the Federal Trade Commission as *Amici Curiae* at 23, *Empagran, S.A. v. F. Hoffmann-Laroche, Ltd.*, No. 01-7115 (D.C. Cir. filed Feb. 16, 2005). By contrast, the scholarly literature – and the testimony of amici – amply documents the burden that discovery imposes, and the resultant pressures for settlement, even in frivolous cases. *See, e.g.*, Brief of MasterCard Int'l Inc., *et al.*, at 4-7.

3. Respondents argue that, if the claim of discrimination in *Swierkiewicz* was sufficient, so too must be their claim of conspiracy. Opp. at 7-8. But there was no dispute that the plaintiff in *Swierkiewicz* (who was Hungarian and 53 years old) alleged all the *conduct* that was required to state a claim – defendant (who was French) fired him and replaced him with another Frenchman who was much younger. The disputed element was discriminatory motive; plaintiff alleged that as well and was given the chance to prove it directly.

Here, by contrast, the *conduct* that plaintiffs have alleged – in the absence of an agreement among the defendants – is lawful even if defendants shared a motive to insulate themselves from competition. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986). What is missing from the complaint is not sufficient basis for

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[4] Any notion that petitioners are arguing for "'immunity from suit'" in this context, Opp. at 18 (quoting *Leatherman*, 507 U.S. at 166), is preposterous. Contrary to respondents' suggestion, merely filing a complaint does not automatically entitle a plaintiff to proceed to summary judgment. Dismissal of complaints that fail to allege the elements of any claim is mandated under Rule 12(b)(6); it is not an "immunity."

inferring anticompetitive motive (which is not required and hardly relevant), but necessary factual allegations indicative of agreement. Indeed, even plaintiffs do not argue that their naked assertion of "conspiracy" fills the gap. *See* Pet. 17-18. Unable to allege any direct facts to support a claim of conspiracy, plaintiffs instead sought to make out a claim by alleging parallel conduct and asking the district court to accept the inference that the conduct was inconsistent with independent, self-interested behavior. *See* Pet. 5-6. The district court carefully reviewed all allegations in the complaint and drew all permissible inferences in plaintiffs' favor, but still correctly found that the complaint utterly failed to satisfy the governing legal standard.

4. Respondents argue that *Dura Pharmaceuticals* is inapplicable here because that case reflected "a heightened pleading objective." Opp. at 13. *Dura* cannot be so confined, because the Court explicitly premised its holding on the assumption that "neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss." 544 U.S. at 346. This Court's determination that the *Dura* plaintiffs were required (but had failed) to allege economic loss and proximate cause did not reflect any "heightened pleading" requirement; the Court simply insisted that plaintiffs plead all of the substantive elements of their claim. The Second Circuit's test – which defers until summary judgment application of the governing legal standard – cannot be reconciled with this fundamental pleading requirement.

5. Respondents seek to deflect attention from the split of authority among the lower courts by arguing, in effect, that cases decided before *Swierkiewicz* should not count. As they conceded below, however, "*Swierkiewicz* did not change the law of pleading." Pet. App. 44a. *Cayman* remains good law in the Tenth Circuit, and *DM Research* in the First.[5]

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[5] Respondents rebuke petitioners for their "disturbing" treatment of *DM Research*, arguing that the case was one of the "guiding lights" of the

Furthermore, respondents cannot contest that the standards applied in *Cayman* and by the Sixth Circuit in *NHL Players Association* conflict with the standard applied below. In each case, the courts demanded that a plaintiff plead facts tending to show that the alleged conduct would be contrary to self-interest *absent* agreement. This is *Matsushita* in a nutshell, and *NHL Players Association* explicitly relied on *Matsushita*'s circuit court progeny. The divergent standards in the circuits add to the urgency for review.

C. The Second Circuit Decision Is Wrong on the Merits

Respondents devote nearly one-third of their opposition to the argument that their complaint satisfied the pleading standard that they insist should not apply. *See* Opp. at 19-28. But respondents' arguments provide no basis to question the district court's conclusion – which the Second Circuit found it unnecessary to consider – that the alleged parallel conduct does not tend to exclude the possibility of independent action.

To the contrary, respondents' arguments provide further support for the conclusion that the alleged parallel conduct is entirely explicable as a matter of self-interest, agreement or no. Respondents quote a "Congressman" asserting that the "Bell Companies . . . clearly believe *it is to their advantage* to pay penalties for violations of the 1996 Act rather than open up their markets." Opp. at 19-20 (emphasis added). Even granting the assertion for the sake of argument, the Bell Companies' evaluation of their own "advantage" nowhere turns (either in the statement or as a matter of logic) on other incumbent providers' decision to follow the same path.

Second Circuit's opinion. Opp. at 11. Whether or not the Second Circuit sought to cloak itself in the legitimacy of Judge Boudin's analysis, the two opinions are irreconcilable. The First Circuit applied the analytical tools of an "antitrust lawyer" in questioning the economic rationality of the claimed conspiracy. 170 F.3d at 56. The Second Circuit reversed Judge Lynch for engaging in the same type of analysis, essentially determining that a motion to dismiss is no occasion for substantive thinking.

Likewise, respondents' "ILEC insider" opined that incumbents "don't want to start a cross-border war. . . . Why would they want to start a cross-border battle?" *Id.* at 20. Again, the "insider" does not hint that any agreement would be required to bring home the supposed hazards of "cross-border" competition. More fundamentally, the complaint itself explains in detail how difficult it is for any CLEC to earn a profit competing against the incumbent. *See* Pet. App. 51a-56a. The district court accordingly, and correctly, concluded that the complaint itself affirmatively stated ample independent reason for each defendant, acting on its own, not to devote scarce resources to a risky new business, whose shaky rules for entry had already been thrown out twice by the courts and were soon to be overturned again.[6]

Respondents concede that the conduct alleged in the complaint "led to several antitrust claims" (including a suit by plaintiff Twombly) "alleging *unilateral* monopolistic conduct" rather than "horizontal conspiracy." Opp. at 20 (emphasis added).[7] All this changed, respondents argue, when unnamed "astute observers" read a statement by "a senior executive of Qwest" as "evidence that the ILEC[s'] parallel

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[6] As noted in the petition, the government testified before Congress that it closely supervised defendants' competitive conduct and was "not aware of evidence of any such agreement." Pet. 25. The government reached that conclusion *after* extraordinarily searching review of the competitive landscape, both in connection with its review of a series of industry mergers (Bell Atlantic/NYNEX, SBC/Pacific Bell, SBC/Ameritech, Bell Atlantic/GTE) and in the course of making recommendations to the FCC regarding defendants' various applications to provide in-region long-distance service under 47 U.S.C. § 271. Other regulators have also considered and rejected allegations of mutual forbearance. *See* Mem. Op. & Order, *Verizon and MCI Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶¶ 53-54 (2005); Cal. Att'y Gen. Op. at 17, *Joint Application of Verizon and MCI to Transfer Control*, Application No. 05-04-020 (Cal. PUC filed Sept. 16, 2005).

[7] It is only because this Court blocked such suits as unwarranted under Section 2, *see Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), that class-action lawyers (not CLECs, which have businesses to run) have turned to Section 1.

conduct likely [is] *not* the product of unilateral decisions by each ILEC." *Id.* at 21. But, as the district court correctly explained, the Notebaert quote does not strengthen respondents' case. It does not provide any *direct* evidence of agreement – there is no suggestion of agreement with rivals. And, as the district court correctly found, the quote does not imply that Qwest acted contrary to its independent interests by forgoing an investment based on a shaky regulatory regime that was wiped away the following year. *See* Pet. 24 n.6.

It does not take a PhD in economics to understand these points, nor do they depend on knowledge of facts outside the four corners of the complaint and materials – like FCC orders and court decisions – of which judicial notice may be taken. A district judge, applying ordinary legal analysis, evaluated the complaint as a whole and determined, correctly, that its allegations of fact, together with all permissible inferences reasonably drawn from them, failed to state a claim. Under such circumstances, Rule 12 mandates dismissal.

D. The Case Is Important

Respondents do not waste effort arguing that the question presented by this case is unimportant. As diverse amici attest, "[t]he Second Circuit's error presents an issue of tremendous practical importance." Brief of Chamber of Commerce, *et al.*, at 6; *see* Brief of PhRMA at 11-13, 15-17. Plaintiffs are already flocking to the Second Circuit to exploit the lax pleading standard adopted below. *See* Pet. 29. Because parallel but unilateral responses to common market conditions are typically pro-competitive, the deterrence of such conduct by the Second Circuit's pleading standard will be affirmatively harmful until corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

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